NO. 85-1255

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In the
Supreme Court of the United States

OCTOBER TERM 1985

ROGER C. GOSLIN,

Petitioner

versus

McDERMOTT, INCORPORATED,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner herein suggests that only one issue is raised herein for which certiorari is petitioned: was the jury in this case asked to calculate whether *further* damages were due, or was the Court's instruction to simply calculate the plaintiff's damages - period - without regard to what he had received or percentages of fault? In any personal injury case, must not the parties know *exactly* what the jury is being asked to calculate, and must not the jury be so instructed?

CERTFICIATE OF INTERESTED PARTIES PURSUANT TO RULE 21.1(b)

The undersigned, counsel of record for ROGER C. GOSLIN, Petitioner, certifies that the following listed parties have an interest in the outcome of this case:

ROGER C. GOSLIN, Petitioner

McDERMOTT, INCORPORATED, Respondent

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TABLE OF CONTENTS

Page

Questions Presented i

Certificate of Interest Parties ii

Table of Contents iii

Table of Authorities iv

Reference to Opinions 1

Jurisdictional Statement 1

Statement of Original Jurisdiction 1

Statutes Involved 1

Statement of the Case 3

Argument 4

Conclusion 12

Certificate 14

Appendix A - Order of Trial Court Granting a New Trial A-1

Appendix B - Order of Trial Court on Rehearing Denying a New Trial A-7

Appendix C - Opinion, U.S. Court of Appeals for the Fifth Circuit, affirming A-13

Appendix D - Order, U.S. Court of Appeals for the Fifth Circuit, denying rehearing A-22

Appendix E - Interrogatories A-23

Appendix F - Judgment of February 14, 1984 ..... A-26

TABLE OF AUTHORITIES

Page

Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962) 8

Bissett v. Ply-Cem Industries, Inc., 533 F.2d 142 (5th Cir. 1976) 11

Bourque v. Diamond M. Drilling Co., 623 F.2d 351 (5th Cir. 1980) 7

Chavis v. Finnlines Ltd., O/Y, 576 F.2d 290 (4th Cir. 1978) 10

Cunningham v. M-G Transport Services, Inc., 527 F.2d 760 (4th Cir. 1975) 11

Don Burton, Inc. v. Aetna Life & Cas. Co., 575 F.2d 702 (9th Cir. 1978) 10

Guidry v. Kem Mfg. Co., 598 F. 2d 402 (5th Cir. 1979), reh. den. 604 F.2d 320, cert. den. 98 S.Ct. 173, 434 U.S. 855, 54 L.Ed.2d 126 10

Harville v. Anchor-Wate Co., 663 F.2d 598 (5th Cir. 1981) 10

Hoskins v. Brown, 84 S.W. 767, 27 Ky.L. 216 (Ct.App. 1905) 10

Kornicke v. Colmar S.S. Corp., 460 F.2d 1134 (3rd Cir. 1972) 11

Kyzar v. Vale Do Ri Doce Navegacai, S.A., 464 F.2d 285 (5th Cir. 1972) 10

Ludwig v. Blackshere, 71 N.W. 356, 102 Iowa 366 (Iowa 1897) 10

McCullough v. Beech Aircraft Corp., 587 F.2d 754 (5th Cir. 1979) 10

Piedmont Engineering & Constr. Corp. v. Hanna Paint Co., 98 S.E.2d 137, 95 Ga. App. 605 (Ct.App. 1957) 10

Pollack v. Koehring Co., 540 F.2d 425 (9th Cir. 1976) 10

Shelak v. White Motor Co., 581 F.2d 1155 (5th Cir. 1978) 10

Snell v. Cottingham, 72 Ill. 124 10

Swift v. Mutter, 115 Ill. 374 10

REFERENCE TO OPINIONS

The previous opinions in this matter are all unpublished.

JURISDICTIONAL STATEMENT

RULE 21(e)

Petitioner seeks review of the judgment and decree of the U.S. Court of Appeal for the Fifth Circuit on November 5, 1985, affirming the Trial Court, on which rehearing was denied on November 29, 1985.

This Honorable Court has jurisdiction to entertain this Petition for Writ of Certiorari by virtue of Article III of the Constitution of the United States, 28 U.S.C. 1254, and Rule 17, et. seq., of the Rules of the United States Supreme Court.

STATEMENT OF ORIGINAL JURISDICTION

Jurisdiction existed in the Trial Court by virtue of the Jones Act, 46 U.S.C. 688, the general maritime law, and diversity of citizenship jurisdiction, 28 U.S.C. 1332.

STATUTES INVOLVED

Applicable to resolution of this matter is Rule 49 of the Federal Rules of Civil Procedcure, which reads as follows:

> RULE 49. SPECIAL VERDICTS AND INTERROGATORIES
> (a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In

special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with

> the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.
>
> (As amended Jan. 21, 1963, eff. July 1, 1963.)

STATEMENT OF THE CASE

This litigation is a seaman's suit against his employer under the Jones Act and general maritime law (in which diversity also exists). It arises out of an accident on June 30, 1981, wherein the petitioner slipped and fell aboard the vessel, causing serious injuries to his lumbar spine, and resulting in functional disability.

The case was tried from January 23, 1984, and a verdict rendered on January 31, 1984. The verdict essentially found: (1) that the defendant was negligent and that such negligence was a legal cause; (2) that there was no unseaworthiness; (3) that the plaintiff was 96% at fault; (4) that no additional maintenance and cure was due; and (5) that plaintiff's damages were zero.

On October 4, 1984, the Trial Court granted a new trial, reasoning that the jury's verdict was inconsistent and contrary to evidence, and, upon consideration of a letter from the jury's foreman, the result of a compromise or otherwise improperly reached. Upon a motion for reconsideration, the Trial Court reversed its earlier ruling, and

reconciled the jury's verdict. It also held that it had improperly considered the letter from the jury foreman.

An appeal was made to the United States Court of Appeal, Fifth Circuit, on February 1, 1985. The Fifth Circuit affirmed the rulings of the Trial Court on November 5, 1985. A rehearing was requested and denied on November 29, 1985.

The sole facts pertinent to this appeal are as follows. The Trial Court's instruction to the jury, as in any personal injury case, was to calculate the plaintiff's damages - period. The jury was *not* instructed to calculate whether the plaintiff was entitled to *further* damages. The lower courts have erred by reconciling the jury's verdict to mean that the plaintiff was entitled to no *further* damages, contrary to the jury instructions. As a result, courts will have no predictability by virtue of similar verdicts.

It is from these erroneous rulings that petitioner requests certiorari.

ARGUMENT

MAY IT PLEASE THE COURT:

I.

BACKGROUND

On June 30, 1981, while employed as a seaman by McDermott, Inc., Roger Goslin was seriously injured when he slipped and fell on the deck of the M/V JARMAC I. Subsequently, Goslin brought suit against his employer under the Jones Act, 46 USC 688, alleging negligence, and under the general maritime law, alieging unseaworthiness. Goslin also sought the recovery of proper maintenance

and cure, including punitive and compensatory damages arising from the failure to pay same, and general punitive damages.

The trial began on January 23, 2984, and concluded with a jury verdict on January 31, 1984. The essence of the jury verdict was as follows:

(1) McDermott was found negligent (with causation) but the vessel was found seaworthy.
(2) Goslin was found comparatively at fault to the extent of 96%.
(3) Goslin was found not entitled to *further* maintenance and cure.
(4) The total damages was expressed as zero.

In order to understand why this verdict was erroneous, the Court's instructions to the jury, as well as the Interrogatories submitted for the verdict, must be reviewed.

II.

THE JURY INSTRUCTIONS AND INTERROGATORIES

The entire instructions given to the jury in this matter can be located at Tr., Vol. III, Pgs. 1208-1253. However, the portion pertinent to compensatory damages consisted of general charges on damages (Tr., Vol. III, Pgs. 1237-1247). *Nowhere* in the charges did the Court refer to any "set-off" for any amounts already paid. The instructions simply dealt with damages generally.

(The instructions regarding maintenance and cure were similarly general. No reference was made to any amount previously paid. Tr., Vol. III, Pgs. 1228-1233).

Upon finishing the general instruction, the Trial Court then explained the interrogatories and verdict form to the jury. A copy of the Jury Interrogatories is attached hereto. Of particular interest is the Trial Court's explanation regarding compensatory damages, addressed in Interrogatory No. 10:

> "Going to number 10, you may answer question number 10 only if your question to number 2 or to question 4 is yes, and that question merely says: What amount do you find would fairly and adequately compensate the plaintiff for his injury? This must be the total amount of the damages without regard to the percentage of plaintiff's contributory negligence, don't subtract that from the amount of judgment you are going to award him in 10 because I will do that. That is all that says."

The Trial Court's instructions and explanations in addition to the interrogatories' language, with regard to compensatory damages, must be contrasted with the instructions, explanations and language given with regard to the maintenance and cure claim. Interrogatory No. 8 simply inquired whether the plaintiff was entitled to "additional" maintenance and cure. No further explanation was given by the Court. (Tr., Vol. III, Pg. 1249).

III.

PERTINENT EVIDENCE

Evidence at trial showed that Goslin was paid $6,346.66 before trial (Tr., Vol III, Pgs. 879-890). Of this, McDermott contended that $1,630.00 was for maintenance and that $4,716.00 was "extra", paid over and above

maintenance obligations (presumably for compensatory damages).

The evidence of injury and damage was patent, even aside from petitioner's own testimony of being in pain after the accident. (Tr. p. 241). The engineer on board, Larry Winstead, testified that Goslin "looked like he was in a lot of pain." (Tr. p. 107). Respondent's own chief medic, James Robertson, examined Goslin twice and found "soreness" and "pain". (Tr. pp. 688, 695). Robertson opined that Goslin might have suffered a "traumatized sciatic nerve". (Tr. p. 699), and projected his minimum disability of 14 days. (Tr. p. 688). He referred Goslin to Dr. Watfa, who confirmed the existence of pain (Tr. pp. 453, 498), found positive findings of diminished sensation and absent reflexes (Tr. pp. 455, 456), diagnosed a muscle sprain (and could not rule out a ruptured disc) (Tr. p. 467), and eventually referred Goslin back for further treatment and testing in the United States. (Tr. pp. 469, 493). Goslin eventually had two lumbar surgeries, including a fusion.

IV.

THE LOWER COURTS' ACTIONS

After trial, noting that the Trial Court had itself noted the "...unusual situation" (Tr., Vol. III, Pg. 1259), the petitioner sought a new trial, contending that the jury's verdict could not be reconciled. There had been considerable evidence of injury and damages, and an award of zero damages was inappropriate where such evidence was clearly shown. *Bourque v. Diamond M. Drilling Co.*, 623 F.2d 351 (5th Cir. 1980). This point was made assuming that the verdict did reflect the jury's opinion with regard

to *total* damages. Alternatively, it was suggested that if the jury took into account the "extra" sums, it did so improperly and contrary to specific instructions about how to arrive at its damages verdict.

(Other grounds were raised also, in the motion for a new trial, but those issues are not pertinent herein).

The Trial Court first granted the new trial citing *Bourque*, supra, but later reversed itself. In its second opinion, the Trial Court changed its mind, resolving the jury's verdict by concluding that it found that respondent was entitled to no *further* damages. Specifically, the Trial Court stated: "The jury simply found that plaintiff had *already been* adequately compensated for his injury and was not entitled to any further award." The Trial Court ignored respondent's contention that the jury was not instructed to calculate *further* damages, but rather was asked to calculate *total* damages.

The matter was subsequently appealed to the U.S. Court of Appeals, Fifth Circuit. The Fifth Circuit, noting correctly that jury verdicts should be reconciled where possible, *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962), agreed with the Trial Court that the verdict could be reconciled by concluding that the jury intended no *further* damages. A rehearing was denied.

Thus, both lower courts reconciled the verdict by deciding that the jury meant petitioner was entitled to no *further* damages.

V.

THE ERRONEOUS RECONCILIATION

At the very least, it must be conceded by all

concerned that at this point, perhaps due to lack of clear jury instructions, the jury's verdict could be the result of several possibilities, all of which nonetheless show the irreconcilability of the verdict.

Originally petitioner's first thought was that the jury awarded zero damages despite clear evidence of injury and damage. If this was the case, the jury's verdict would have been improper, in view of clear evidence of damage. *Bourque*, supra.

A second possibility is that the jury improperly applied the high percentage of comparative fault to end up with zero damages *awarded*, despite whatever their conclusion was as to actual, total damages. Had this been the case, again the verdict would have been improper since the Trial Court clearly instructed the jury not to take such percentages into account. (Tr., Vol. III, P. 1250).

The last possibility is that the jury did, in fact, conclude that the plaintiff was entitled to no *further* damages, because what he had received as much or more than his total damages. Perhaps it is fair on the lower courts' parts to take this position as opposed to the first two possibilities, since they would obviously have resulted in an improper verdict, but this does not mean the conclusion renders the verdict reconcilable.

The simple fact of the matter is that a jury, in cases such as this where sums have allegedly already been paid, must be specifically instructed as to what it is being asked to do with regard to damages. If a "set-off" or credit is being alleged, and if the parties desire that the jury take that into account, then the jury should be so specifically instructed, *and* the jury interrogatories should take such an allegation into account.

Rule 49 of the Federal Rules of Civil Procedure states

that special interrogatories may be used, but dicates that the court "shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue." Certainly, it is an elementary principle that jury instructions, viewed as a whole, must adequatley set forth the law and how it should be applied, as well as the contentions of the parties. *McCullough v. Beech Aircraft Corp.*, 587 F.2d 754 (5th Cir. 1979); *Shelak v. White Motor Co.*, 581 F.2d 1155 (5th Cir. 1978); *Chavis v. Finnlines Ltd., O/Y*, 576 F.2d 290 (4th Cir. 1978). Where jury instructions are misleading, insufficient, inconsistent or equivocal, or leave substantial or ineradical doubt in the court's mind on review, such instructions may be prejudicially erroneous. *Don Burton, Inc. v. Aetna Life & Cas. Co.*, 575 F.2d 702 (9th Cir. 1976); *Pollack v. Koehring Co.*, 540 F.2d 425 (9th Cir. 1976); *Kyzar v. Vale Do ri Doce Navegacai, S.A.*, 464 F.2d 285 (5th Cir. 1972). Where instructions concern the allegation of payment, the facts cannot be assumed in the instructions. The Court must instruct the jury on application of the alleged payments and the intent of the parties with regard to same. *Piedmont Engineering & Constr. Corp. v. Hanna Paint Co.*, 98 S.E.2d 137, 95 Ga. App. 605 (Ct.App. 1957); *Swift v. Mutter, 115 Ill. 374; Hoskins v. Brown*, 84 S.W. 767, 27 Ky.L. 216 (Ct.App. 1905); *Ludwig v. Blackshere*, 71 N.W. 356, 102 Iowa 366 (Iowa 1897); *Snell v. Cottingham*, 72 Ill. 124.

Similarly, special interrogatories, when used, must be skillfully employed and framed so as not to cause inconsistent answers, and should address all material issues raised by the pleadings and evidence. *Harville v. Anchor-Wate Co.*, 663 F.2d 598 (5th Cir. 1981); *Guidry v. Kem Mfg. Co.*, 598 F.2d 402 (5th Cir. 1979), reh. den. 604 F.2d 320, cert. den. 98 S.Ct. 173, 434 U.S. 855, 54 L.Ed.2d 126.

Where particular theories or fact findings are separable, the interrogatories should so reflect. *Bissett v. Ply-Cem Industries, Inc.*, 533 F.2d 142 (5th Cir. 1976); *Cunningham v. M-G Trnasport Services, Inc.*, 527 F.2d 760 (4th Cir. 1975); *Kornicke v. Colmar S.S. Corp.*, 460 F.2d 1134 (3rd Cir. 1972).

The point herein is that *this* jury was *not* so instructed. To the contrary, this jury was told specifically by the Trial Court to calculate "...the total amount of the damages..." (Tr., Vol. III, P. 1250). *Nowhere* was a set-off or credit mentioned, either in the instructions or the interrogatories. Certainly, the evidence of the payments was there for consideration. However, if the jury in fact considered this evidence, and desired a set-off, it should have concluded that the net damages were *equal* to or less than the amount of the set-off, (in this case, $4,716.00). It could have done this easily by setting *total* damages at a low enough figure so that after a 96% reduction the net would be less than what was already paid. Then, presumably, the Trial Court would have concluded that plaintiff was entitled to no further damages.

The foregoing is, however, what the jury was *supposed* to do. It is not, obviously, what the jury did.

By analogy, the instructions and interrogatory on maintenance and cure must be considered. Certainly, with repsect to maintenance and cure, the dispute was whether petitioner was entitled to *further* amounts, and the special interrogatory was so worded. The damages interrogatory, however, was *not* so worded.

Thus, the end result (assuming the lower courts' versions are correct factually) is that this jury concluded no *further* damages were due, when it was asked to calculate *total* damages. It simply did not follow the instructions,

and this conclusion is certain no matter what the jury did otherwise.

If the reconciliation by the lower courts is accepted, then we will never know what the actual, total damages were. Furthermore, in future cases with similar facts, unless this Honorable Court takes appropriate actions, this mystery will occur in future cases. Unless a jury's instructions and the interrogatories put to it are clear, where a set-off or credit is alleged, we will never really know if a jury does what it is supposed to do. The only way this sort of occurence can be avoided is to order a new trial, in which set-off or credit will be fully explained, and in which the jury, by special interrogatories, is asked first, whether a set-off is due and if so how much, and second, what the *total* damages are without respect to *anything* else considered.

For these reasons, a new trial should be granted, reversing the lower courts.

CONCLUSION

Unquestionably this jury was not instructed in any way about the alleged payments made. Nor did the instructions deal with any issues of compensation, payment or set-off. Yet, the lower courts concluded that the jury did use notions of set-off in reaching its verdict by concluding that petitioner was entitled to no "further" damages. This is *not* what the jury was asked to calculate. If this is not what the jury did, then it improperly took into account the comparative negligence, or it ignored patent evidence of damages.

Regardless of which road the jury actually took, the destination was the same - an improper, irreconcilable verdict. for these reasons, the lower courts must be reversed

and a new trial ordered, granting the writ requested.

Respectfully submitted,

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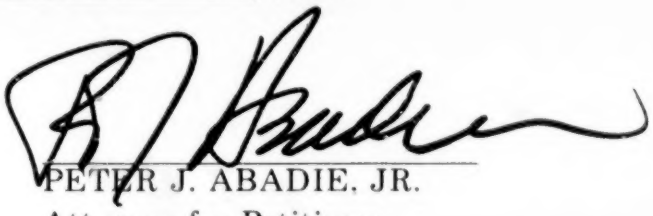
Attorneys for Plaintiff

CERTIFICATE

I HEREBY CERTIFY that I am a member of the Bar of this Court representing the petitioner herein and that three copies of the above petition for writ of certiorari to the Fifth Circuit Court of Appeals were served upon counsel for the respondent, first class postage prepaid, addressed to his office in New Orleans, Louisiana, this 23 day of JANUARY, 1986.



PETER J. ABADIE, JR.
Attorney for Petitioner

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ROGER C. GOSLIN	CIVIL ACTION
versus	NO. 82-3381
McDERMOTT INCORPORATED	SECTION "B"

This cause came on for hearing February 29, 1984 on motion of plaintiff, Roger Goslin, for new trial. The Court having fully considered the law, the record, the memoranda of counsel and their arguments is now fully advised in the premises and ready to rule. Accordingly,

IT IS THE ORDER OF THE COURT that the motion of Roger Goslin for new trial be, and the same is hereby, GRANTED.

REASONS

This matter was tried on January 23-30, 1984 on the last day of which the jury rendered a verdict according to Special Interrogatories submitted by the Court with the concurrence of counsel for both parties. The jury answered the Interrogatories finding defendant, McDermott, Inc., negligent under the Jones Act, and that the negligence played a part in plaintiff's injury. The jury found no unseaworthiness of McDermott's vessel the JARAMAC 49, but found the plaintiff to be 96% contributorily negligent. The controversy regarding the verdict arose due to the fact the jury found that plaintiff was entitled to *no damages*

despite the fact that the court gave specific written instruction to the effect that any reductions or calculations which would be necessary as a result of the finding of contributory neglignece would be made by the court. Plaintiff claims that the jury could not reasonably have awarded no damages when it found liability on the part of the plaintiff. Plaintiff supports his position with reference to the case Bourg v.. Diamonds M. Drilling Co., 623 F.2d 351 (5th Cir. 1981) in which the Fifth Circuit Court of Appeals held that where a jury finds negligence of the employer but no damages, although there was no dispute as to whether the injury caused plaintiff's knee problems of which he was primarily complaining, the verdict was so inconsistent that a new trial was required. The Fifth Circuit stated that even if it could accept defendant's explanation that the jury must have found no connection between the accident and appellant's knee problems, "it would strain logic to assume that this injury caused him no pain and suffering."

Defendant, McDermott, argues that the Seventh Amendment to the United States Constitution requires a court to adopt a view of a verdict which renders the jury's answers consistent if that is at all possible. Griffin v. Matherne, 471 F.2d 91, 915 (5th Cir. 1973). As such, the test to be applied in reconciling apparent conflicts in the jury's answer is "whether the answers may fairly be said to represent a logical and probable decision in the relevant issues as submitted." 471 F.2d at 915. Defendant also argues that the *Bourg* case is inapposite to our situation because there was no indication that Bourg was voluntarily paid substantial amounts of money directly as compensation for his injury. McDermott had paid Goslin a total of $6,346.66 in compensation between the date of his accident, June 30, 1981, and his discharge to return to full duty

following resolution of his back sprain on September 15, 1981 pursuant to Goslin's contract. McDermott argues that the jury, in awarding "0" damages, may have determined that the plaintiff had already been justly and fairly compensated for his injuries.

One further wrinkle in the case occurred on March 21, 1984 when the foreperson on the jury took it upon himself to send the Court an unsolicited, uninvited letter stating as follows:

> "We found J. Ray McDermott negligent to the extent of 3% for Captain Goslin's accident, and held the Captain negligent to the extent of 96%. One jury member believed J. Ray McDermott was negligent in hiring the Captain in the first place, that the company was negligent in not looking further into his back ground. One member went along with that view, four of us opposed, but to avoid fruitless delay and the possibility of a hung jury, we agreed to assign the company 3% negligence...."

The Court believes that this letter is evidence of the fact that the jury reached a "compromise" verdict to avoid further delay. However, in the charges the jury was instructed that a seaman is entitled to recover under the Jones Act if the finder of fact believes the defendant to be guilty of negligence "however slight". In this case it is apparent that the jury was split as to McDermott's negligence and somehow believed that the issue could be resolved by assigning a "small amount of negligence" to McDermott. We cannot speculate as to why they reached the conclusion that Goslin was entitled to "0" damages.

As conscious as we are of the need to find consistency in a jury verdict, we feel compelled to grant a new trial

under the mandate of the Fifth Circuit as set forth in *Bourg v. Diamond M. Drilling Co.*, because we simply cannot reconcile the jury's verdict with the facts as they have been presented to us.

Accordingly,

IT IS THE ORDER OF THE COURT that the motin of Roger Goslin for a new trial be, and the same is hereby, GRANTED.

New Orleans, Louisiana, this 4th day of October, 1984.

_____

UNITED STATES DISTRICT JUDGE

Dr. Williams H. Adams, Head
Department of History
Nicholls State University
P.O. Box 2024, University Station
Thibodaux, Louisiana 70310

March 21, 1984

Honorably Frederick Heebe, Judge
U.S. District Court
Eastern District of Louisiana
500 Camp Street
New Orleans, Louisiana 70130

Dear Sir:

I was the foreperson of the jury in the case of Captain Roger V. Goslin, J. Ray McDermott, which ended January 31, 1984.

We found J. Ray McDermott negligent to the extent of 3% for Captain Goslin's accident, and held the Captain negligent to the extent of 96%. One jury member believed J. Ray McDermott was negligent in hiring the Captain in the first place, that the company was negligent in not looking further into his background. One member went along with that view, four of us opposed, but to avoid further fruitless delay and the possibility of a hung jury, we agreed to assign the company 3% negligence.

I am most anxious to know if there has been an appeal.

I also wish to express my thanks for the courtesy and consideration your court extended to myself and the other members of the jury.

Sincerely,

Dr. William H. Adams, Head
Department of History
Nicholls State University

WHA/dc

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ROGER GOSLIN	CIVIL ACTION
versus	NO. 82-3381
MCDERMOTT, INC.	SECTION "B"

This cause came on for hearing on a previous day on the motion of defendant, McDermott, Inc., for reconsideration of the Court's order granting plaintiff's motion for a new trial. The Court, having heard the arguments of counsel and having studied the legal memoranda submitted by the parties, is now fully advised in the premises and ready to rule. Accordingly,

IT IS THE ORDER OF THE COURT that the motion of defendant, McDermott, Inc., for reconsideration be, and the same is hereby GRANTED, and that the Court's previous order of October 4, 1984 granting plaintiff's motion for a new trial be VACATED.

IT IS THE FURTHER ORDER OF THE COURT that plaintiff's motion for a new trial be, and the same is hereby DENIED.

REASONS

Plaintiff, Roger Goslin, sued his employer McDermott, Inc. (McDermott), under the Jones Act and under general maritime law unseasworthiness and maintenance and cure. After the trial in January 1984, the jury answered

interrogatories finding 1) McDermott negligent, 2) that McDermott's negligence played a part in plaintiff's injury, 3) no unseaworthiness of the vessel owned by McDermott, and 4) the plaintiff Roger Goslin 96% contributorily negligent. Depsite these findings, the jury found that plaintiff was entitled to *no damages*. Plaintiff subsequently brought a motion for a new trial on the grounds that the answers to the jury's interrogatories were inconsistent. Plaintiff relied on Bourque v. Diamond M. Drilling Co., 623 F.2d 351 (5th Cir. 1980), wherein the court of appeals held that plaintiff was entitled to a new trial due to inconsistent answers to jury interrogatories. *Bourque* was a Jones Act case in which the jury had found negligence (and causation), unseaworthiness (and causation), 80% contributory negligence, and yet awarded no damages to the plaintiff. The Fifth Circuit Court of Appeals ordered a new trial reasoning that the evidence was clear that plaintiff therein suffered at least some damages (plaintiff had an ankle and knee injury and was on crutches for a week after his accident) and consequently, was owed something if liability was found.

This Court granted plaintiff a new trial on October 4, 1984. McDermott has now brought a motion requesting the Court to reconsider its grant of a new trial to plaintiff, or in the alternative, to certify for appeal the order granting plaintiff a new trial, so as to limit the new trial to damages only. After reviewing the memoranda and the record in the present case, the Court has decided to grant McDermott's motion for reconsideration, vacate its previous order granting plaintiff a new trial, and deny plaintiff's motion for a new trial.

In its order granting plaintiff a new trial, the Court referred to a letter received by the Court approximately 2

months after the jury's verdict, from the foreman of the jury in this proceeding. The foreman's letter (Document No. 151 in the record) discussed certain aspects of the jury's deliberations. In its motion for reconsideration, McDermott argues that under Fed.R.Evid. 606(b) the internal mental relfections of a juror cannot serve as the basis for impeachment of a jury's verdict. Fed.R.Evid. 606(b) provides:

> (b)*Inquiry into validity of verdict or indictment.* Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to the jury's attention or whether any ouside influence was imroperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

The Court finds that McDermott's position is correct. Accordingly, the foreman's letter has not been considered in this Court's decision on whether to grant plaintiff a new trial.

When evaluating the verdict of a jury, courts are required under the Seventh Amendment, to attempt to reconcile the jury's verdict if at all possible. Atlantic & Gulf

Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355 (1962); Mercer v. Long Manufacturing N.C., Inc. 665 F.2d 61 (5th Cir. 1982); Bourque v. Diamond M. Drilling Co., 623 F.2d 351 (5th Cir. 1980). Defendant McDermott argues that the jury verdict here is reconcilable: the jury found McDermott liable but found that plaintiff was entitled to no *further* damages. McDermott points out that the evidence presented at trial showed that plaintiff received compensation from McDermott for his injury' plaintiff received maintenance and cure, *plus* an additional amount, over and above his maintenance and cure payments. The fact that the jury found defendant negligent yet awarded no damages to plaintiff, does *not* make the jury's responses inconsistent. The jury simply found that plaintiff had *already been* adequately compensated for his injury and was not entitled to any further award.

To support its position that the answers to the jury interrogatories are reconcilable, McDermott contends that 1) the *Bourque* decision is not directly on point, and 2) the *Bourque* decision does not stand for the proposition that in every situation where liability is found, an award of no damages is improper. To distinguish *Bourque*, McDermott points out that there was no evidence of any payments being made by the defendant therein, a previous employer of the plaintiff, to the plaintiff on account of his injuries.[1] In the situation before the Court today, McDermott contends that the jury was aware of these payments and could have

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[1] There was some evidence in *Bourque* that the plaintiff had received compensation payments from the workman's compensation insurer of his current employer, not the defendant in that proceeding. The court of appeals discussed the application of the collateral source rule. That specific issue is not relevant to this proceeding before the Court as the payments here were made by plaintiff's employer McDermott to plaintiff Goslin and, therefore, does not concern a "collateral source".

believed that plaintiff had already been adequately compensated for his injury and, therefore, awarded plaintiff no *further* compensation.

In contending that the *Bourque* decision does not stand for the proposition that in every situation where liability is found, an award of no damages is improper, McDermott cites various cases where courts have upheld jury verdicts of liability and no damages. Aquachem Co. v. Olin Corp., 699 F.2d 516 (11th Cir. 1983); Estes v. So. Pacific Railroad Co., 598 F.2d 1195 (10th Cir. 1979); Spears v. Hough, 458 F.2d 529 (8th Cir.) *cert. den.* 409 U.S. 878 (1972); Wingerter v. Maryland Casualty Co., 313 F.2d 754 (5th Cir. 1963). These cases are based on the rationale that under the circumstances of that particular case the jury found and the evidence supported the conclusion that the plaintiff had suffered no damages.

Whether a jury finding of liability and no negligence is consistent or not depends on the particular facts of each case. The Court agrees with defendant's position that the *Bourque* case is distinguishable from the case pending before the Court today and that *Bourque* does not stand for the proposition that in every situation where liability is found, and award of no damages is improper. The evidence in this proceeding did show that plaintiff received maintenance and cure payments, as well as additional amounts as compensation on account of his injury.[2] It is conceivable (and the evidence would support such a conclusion) that the jury found that plaintiff had already been

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[2] The jury interrogatory relating to maintenance and cure provided: "8. Is the plaintiff entitled to receive any *additional* maintenance and cure?" (emphasis added). The jury was aware that plaintiff had already received some maintenance and cure and was to determine whether plaintiff was entitled to any *additional* maintenance and cure or not.

adequately compensated for his injury and was entitled to no *further* damages. Considering the obligation of the Court to reconcile the jury's verdict if possible, the Court finds that the jury's answers to the interrogatories are consistent under the circumstance of this case.

Accordingly,

IT IS THE ORDER OF THE COURT that the motion of defendant, McDermott, Inc., for reconsideration be, and the same is hereby GRANTED and that the Court's previous order of October 4, 1984 granting plaintiff's motion for a new trial be VACATED.

IT IS THE FURTHER ORDER OF THE COURT that plaintiff's motion for a new trial be, and the same is hereby DENIED.

New Orleans, Louisiana, this 24th day of January, 1985.

_____

UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-3066
Summary Calendar

ROGER C. GOSLIN,

Plaintiff-Appellant,

v.

McDERMOTT INCORPORATED,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

(November 5, 1985)

Before GEE, RANDALL and DAVIS, Circuit Judges.
PER CURIAM:*

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes neddless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Appellant Roger Goslin appeals from an order of he district court denying him a new trial. For the reasons discussed below, we affirm the order of the district court.

I.

Appellant Roger Goslin ("Goslin") was employed by Appellee McDermott, Inc. ("McDermott") as captain of the M/V Jaramack 49, a tugboat operating in waters off the African coast in Nigeria. On June 30, 1981, while at work, Goslin slipped and fell. There was evidence presented that Goslin had been intoxicated at the time of his fall. He subsequently suffered pain in his groin area and in his back, rendering him unable to work for a period of time. He continued to complain of lower back pains, received treatment in Nigeria, and was finally sent back to the United States for further treatment.

For the first five days following the accident Goslin received his full salary. From July 5 to September 15, 1981, McDermott paid Goslin medical completion and compensation payments totalling $6,346.66. Of that amount, roughly $1,630.00 covered maintenance; the balance of approximately $4,716.00 was paid to Goslin for his injury. Record vol. 5 at 902. McDermott also paid $970.00 for medical expenses incurred by Goslin prior to September 15. On September 15, Goslin was medically cleared to return to work.

Goslin sued McDermott for negligence under the Jones Act, and for unseaworthiness and maintenance and cure under general maritime law. After the trial, the jury answered special interrogatories, finding no unseaworthiness of the vessel owned by McDermott. The jury found McDermott negligent, however, and further found that

McDermott's negligence played a part in the plaintiff's injury. Finally, the jury found Goslin ninety-six percent contributorily negligent. The jury concluded that Goslin was entitled to no damages, finding that "$0" was the amount that "would fairly and adequately compensate the plaintiff for his injury."

Goslin moved for a new trial, claiming that the jury's answers to the interrogatories were inconsistent. Goslin relied on *Bourque v. Diamond M. Drilling Co.*, 623 F.2d 351 (5th Cir. 1980), in which we held that inconsistent jury answers to interrogatories entitled the plaintiff to a new trial. In *Bourque*, a Jones Act case, the jury found negligence on the part of the defendant and contributory negligence of eighty percent on the part of the plaintiff. The jury, however, awarded the plaintiff no damages. Because the evidence clearly showed that the plaintiff had suffered some damages and was hence owed something if liability were found, we ordered a new trial.

Citing *Bourque*, the district court granted Goslin's motion. On reconsideration, however, the court vacated its first order and denied Goslin's motion for a new trial. The court distinguished *Bourque* from the instant case. In *Bourque*, there was no evidence of any payments being made by the defendant-employer to the plaintiff on account of the injuries sued upon. In the instant case, however, McDermott paid $4,716.00 above its maintenance payments as compensation for Goslin's injuries. The court reconciled the jury's verdict by noting that since Goslin had already recieved some $4,716.00 in compensation for his injury, it was "conceivable (and the evidence would support such a conclusion) that the jury had found that Goslin had already been adequately compensated for his injury and was entitled to no *further* damages." Record Vol. 2 at

581.

Goslin appeals the second order of the district court and raises four issues for our consideration. First, Goslin questions the district court's reconciliation of the jury's answers. Second, Goslin finds fault with the district court's refusal to consider in its second order a letter from a juror discussing the process by which the jury reached its verdict. Third, Goslin complains about the district court's exclusion of testimony as hearsay. Finally, Goslin protests the court's inclusion of the deposition testimony of an absent witness. Goslin fails to convince us of the merits of these arguments.

II.

The test for determining whether jury answers to interrogatories are inconsistent is well-established in this Circuit:

> This court has stated that the test to be applied in reconciling apparent conflicts between the jury's answers is whether the answers may fairly be said to represent a logical and probable decision on the relevant issues as submitted.... If on review of the District Court's judgment we find that there is no view of the case which makes the jury's answers consistent and that the inconsistency is such that the special verdict will support neither the judgment entered below nor any other judgment, then the judgment must be reversed and the cause remanded for trial anew.

Mercer v. Long Manufacturing N.C., Inc., 665 F.2d 61, 65 (5th Cir. 1982) (*quoting Griffin v. Matherne*, 471 F.2d 911, 915 (5th Cir. 1973)). We are required under the Seventh

Amendment to make a concerted effort to reconcile apparent inconsistencies if at all possible. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962). The district court, as noted above, reconciled the jury's answers in the instant case by finding that the jury's answer of zero damages meant that no *further* damages were due Goslin.

Goslin does not directly attack the district court's reconciliation of the jury answers. He does not contend that there is "no view of the case" which will support the district court's conclusion that the jury found him entitled to "no further damages." Instead, Goslin attacks the district court's reconciliation of the answers from an unexpected and ultimately unconvincing angle. Goslin claims that the district court's reconcilation of the jury's answers cannot be supported unless we find that the jury violated a district court instruction and improperly considerd percentages of fault in computing damages. We do not see, however, that the jury's finding of no further damages has anything to do with the instruction against considering percentages of fault. The computation of no further damages is a separate and discrete inquiry from the consideration of percentages of fault. We do not find that the jury here blended these inquiries. The jury could very well have decided that $4716.00 represented the maximum recovery Goslin was entitled to no matter how the percentages of fault ultimately figured in: regardless of percentages of fault, Goslin had received all he was entitled to receive. Regardless of percentages of fault, Goslin was then due no further damages. Our conclusion that the jury's decision to award Goslin no further damages could be reached without considering percentages of fault is supported by the district court's order, which logically recon-

ciles the jury's answers without resort to the mathematical calculations urged on us by Goslin. Golsin fails to persuade us that the district court erredin reconciling the answers of the jury. We thereby uphold the order of the district court correctly reconciling the jury answers in accord with the mandate of the Seventh Amendment. *Atlantic & Gulf Stevedores, Inc.*, 369 U.S. at 364.

III.

In its order denying Goslin a new trial, the district court refused to consider a letter from the foreman of the jury received by the court approximately two months after the jury's verdict. The foreman's letter discussed the jury's deliberations and suggested that the jury voted as it did as a compromise: "to avoid further fruitless delay and the possibility of a hung jury...." Document No. 151. The district court refused to consider the letter under Fed. R. Evid. 606(b), which provides that the internal mental reflections of a juror cannot serve as the basis for the impeachment of a jury's verdict. Rule 606(b) only allows inquiry into the mental reflections of a juror if there is evidence of improper outside influence or extraneous information brought to bear on the jury. Goslin offers no facts to suggest that the foreman's letter should have been considered under this exception to Rule 606(b). In fact, Goslin cites no authority to support his argument but merely insists that we should ignore the clear language of Rule 606(b) and cast off its "shroud of technicalities." Appellant's Brief at 14. This we will not do. We affirm the district court's refusal to consider the foreman's letter.

IV.

Before trial, Goslin's hired investigator, William Cambre, interviewed Larry Winstead, the engineer aboard the M/V Jaramac 49. Winstead testified at trial that Goslin had been intoxicated at the time of his injury. Goslin then called Cambre to the stand to testify that Winstead had made off-the-record statements to Cambre during the pre-trial interview, statements which Cambre did not include in his investigatory report. These statement allegedly revealed that McDermott had instructed Winstead to testify adversely to Goslin, and that there was a "game plan" devised on how to testify. The district court excluded these statements as hearsay. Goslin now challenges this ruling, contending that the statements should have been admitted as admissions under Fed. R. Evid. 801, or allowed under Rule 803(24), the catch-all section of exceptions to the hearsay rule.

Absent proof of abuse, an appellate court will not disturb a district court's evidentiary rulings. *Jon-T Chemicals, Inc. v. Freepot Chemical Co.*, 704 F.2d 1412, 1417 (5th Cir. 1983). We do not find that the district court here abused its discretion in refusing to admit the statements. Under Rule 801(d)(2)(D), statements by an employee will be admissible as admissions of the employer if such statements concern matters within the scope of the employee's employment. Goslin has not shown that the alleged statements concerned matter within Winstead's employment. The evidence, in fact, suggests otherwise. Winstead testified that his duties as chief engineer on McDermott vessels in West Africa included the maintenance and condition of the engine room and mechanical things with the vessel, "that's all." Record Vol.

3 at 44. There is no evidence that Winstead had any authority to make decisions pertaining to the strategy of McDermott's defense in personal injury lawsuits.

Nor do we find that Cambre's proferred testimony is admissible under the catch-all exception to the hearsay rule. Rule 803(24) allows certain statements to be excepted from the hearsay rule if the statements have "circumstantial guarantees of trustworthiness" equivalent to the other listed exceptions and

> the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure throught reasonable efforts; and (C) the general purposes of these rules in the interest of justice would be best served by admission of the statement into evidence.

Fed. R. Evid. 803(24). *See also United States v. Mathis*, 559 F.2d 294 (5th Cir. 1977). Cambre's proffered testimony is not more probative than a cross-examination of Winstead would have been. Winstead was called as Goslin's first witness in this case. We have previously observed that in the absence of a showing that an out-of-court declarant could not be procured to testify about his assertions, testimony from a third party concerning those assertions would not be admissible under the general hearsay exception. *Elizarraras v. Bank of El Paso*, 631 F.2d 366, 374 n.24 (5th Cir. 1980).

V.

Goslin's final contention is that the district court er-

red in failing to exclude the deposition testimony of a witness who had been subpoenaed but failed to appear. Use of a deposition at trial is discretionary and the court's decision on this matter can only be overturned upon a showing of abuse of discretion. *Bobb v. Modern Products, Inc.*, 648 F.2d 1051, 1055 (5th cir. 1981).

We do not find that Goslin had made this requisite showing. A deposition may be used by any party for any reason if the court finds that the witness is more than 100 miles from the place of trial, unless it appears that the absence of the witness was procured by the party offering the deposition. Fed. R. Civ. P. 32(a)(3)(B). The witness here lived in Natchez, more than 100 miles from New Orleans where the trial was held. Goslin offers no evidence that McDermott procured the absence of the witness.

Nor did the use of the deposition deprive Goslin of his Seventh Amendment right to cross-examine the witness. The deposition lasted approximately five hours; Goslin's counsel was present and cross-examined the witness at that time. Goslin claims that regardless of his cross-examination of the witness at the time the deposition was taken, he was denied a proper cross-examination because the witness was deposed before many of the "critical issues" and "inconsistencies" of the case arose. Appellant's Brief at 19. This claim seems to be without merit. Goslin does not identify any critical issues and/or inconsistencies of which he was deprived proper cross-examination. We do not find that Goslin's right to confrontation was violated.

VI.

For the above reasons, the order of the district court denying Goslin a new trial is AFFIRMED.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-3066

ROGER G. GOSLIN,

Plaintiff-Appellant,

versus

McDERMOTT INCORPORATED,

Defendant-Appellee.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON PETITION FOR REHEARING
(November 29, 1985)

Before GEE, RANDALL, ann DAVIS, Circuit Juuges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ROGER C. GOSLIN — CIVIL ACTION

versus — NO. 82-3381

McDERMOTT INCORPORATED — SECTION "B"

INTERROGATORIES

1. Was the defendant, McDermott, Inc., negligent?

Yes(✓) No( )

If your answer is "No", skip question No. 2 and proceed to question No. 3. If your answer is "Yes" answer question No. 2.

2. Did the negligence of McDermott, Inc. play a part, even in the slightest, in producing Roger Goslin's injury?

Yes(✓) No( )

Proceed to Question No. 3.

3. Was the vessel Jaramac 49 unseaworthy?

Yes(✓) No( )

If your answer is "No", skip question No. 4 and 5, and proceed to question No. 6. If your answer is "Yes", proceed to question No. 4.

4. Was the unseaworthy condition of the Jaramac 49 a proximate cause of plaintiff Roger Goslin's injury?

Yes(✓) No( )

If your answer is "Yes", proceed to question No. 5. If your answer is "No", proceed on to question No. 6.

5. Is plaintiff entitled to punitive damages for the unseaworthy condition of the Jaramac 49?

Yes( ) No( )

Proceed to Question No. 5a if your answer is "Yes", if "No", proceed to question No.6.

5a. What amount do you find defendant owes to plaintiff as punitive damages?

$_____

Proceed to question No.6.

6. NOTE: You may answer question No. 6 ONLY if your answer to question No. 2 or to question No. 4 was "Yes".

Was the plaintiff, Roger Goslin, contributorily negligent?

Yes(✓) No( )

If your answer is "No", skip question No. 7 and proceed to question No. 8. If your answer is "Yes", proceed to question No. 7.

7. to what extent expressed in a percentage, did plaintiff Roger Goslin's contributory negligence contribute to his injury?

96%

Proceed to question No. 8.

8. Is the plaintiff entitled to receive any addition maintenance and cure?

Yes( ) No(✓)

If your answer is "Yes", proceed to question No. 9. If your

answer is "No", skip question No. 9 and 9a and go on to question No. 10.

9. What amount do you find defendant owes to plaintiff to compensate him for maintenance and cure?

$_____

9a. Has defendant unreasonably failed to pay maintenance and cure? If so what amount of compensatory damages does defendant owe plaintiff?

$_____

Go on to question No. 10.

10. NOTE: You may answer question No. 10, ONLY if your answer to question No. 2 or to question No. 4 is "Yes".

What amount do you find would fairly and adequately compensate the plaintiff for his injury? (This must be the total amount of the damages *without* regard to the percentage of plaintiff's contributory negligence, if any, because the Court will apportion the damages.)

$0

_____

FOREPERSON

New Orleans, Louisiana,
this 31st day of January, 1984.

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ROGER C. GOSLIN	*	CIVIL ACTION
VERSUS	*	NO. 82-3381
McDERMOTT INCORPORATED	*	SECTION "B" (4)
CONSOLIDATED WITH		
CHARLOTTE GOSLIN	*	CIVIL ACTION
VERSUS	*	NO. 83-5183
McDERMOTT INCORPORATED	*	SECTION "B" (2)

JUDGMENT

Considering the verdict of the jury and the direction of the Court as to the entry of the Judgment; accordingly

IN IS ORDERED, ADJUDGED AND DECREED that there be Judgment in favor of the defendant, McDermott Incorporated, and against the plaintiff, Roger C. Goslin, dismissing his entire lawsuit, all court costs to be assessed against the plaintiff.

New Orleans, Louisiana, this 14th day of February, 1984.

_____
United States District Judge